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In the Supreme Court of the United States

OCTOBER TERM, 1935

No. 36

THOMAS W. WHITE, FORMER COLLECTOR OF INTERNAL REVENUE, petitioner

v.

MARY ADELAIDE POOR ET AL., SURVIVING EXECUTORS

ON WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE FIRST CIRCUIT

BRIEF FOR THE PETITIONER

OPINIONS BELOW

The opinion of the District Court (R. 43–49) is reported in 8 F. Supp. 995. The opinion of the Circuit Court of Appeals for the First Circuit (R. 53–57) is reported in 75 F. (2d) 35.

JURISDICTION

The judgment of the Circuit Court of Appeals for the First Circuit was entered on January 31, 1935. (R. 57.) Petition for writ of certiorari was filed April 29, 1935, and was granted May 20, 1935. (R. 58.) The jurisdiction of this Court rests on

Section 240 (a) of the Judicial Code, as amended by the Act of February 13, 1925.

QUESTIONS PRESENTED

The decedent transferred certain property to herself, her son, and a third person, as trustees, to pay one-half of the income to the decedent during her lifetime and the other half to her three children until her death, with certain remainders over. The trust instrument provided that the trust might be terminated at any time by the trustees, such termination to be evidenced by written declaration signed, sealed, and acknowledged by them. The questions presented are:

1. Whether the property transferred in trust under such circumstances by the decedent should be included in her gross estate within the meaning of Section 302 (d) of the Revenue Act of 1926 because the enjoyment of the property was subject at the date of her death to change through the exercise of a power by the decedent in conjunction with other persons, to alter, amend, or revoke.

2. Whether Section 302 (d), as applied to the facts of this case, violates the Fifth Amendment to the Constitution.

3. Whether Section 302 (d) of the Revenue Act of 1926 requires the inclusion in the decedent's gross estate of the value of the interests of the decedent's children, other than the son Arthur, in a trust created by the decedent, where the decedent, in conjunction with her son Arthur who had an

interest in the trust, and another person, had the power to alter, amend, or revoke the trust.

STATUTE INVOLVED

Revenue Act of 1926, c. 27, 44 Stat. 9:

> SEC. 302. The value of the gross estate of the decedent shall be determined by including the value at the time of his death of all property, real or personal, tangible or intangible, wherever situated—
>
> * * * * *
>
> (d) To the extent of any interest therein of which the decedent has at any time made a transfer, by trust or otherwise, where the enjoyment thereof was subject at the date of his death to any change through the exercise of a power, either by the decedent alone or in conjunction with any person, to alter, amend, or revoke * * *.
>
> (U. S. C. App., Title 26, Sec. 1094.)

STATEMENT

The essential facts as stipulated and found by the District Court (R. 43–45) are as follows:

In 1919 the decedent, Adelaide J. Sargent, conveyed certain property to herself, her son, and a third person, as trustees, to pay one-half of the net income to the decedent during her lifetime and the other half to the decedent's three children until her death, and thereafter all the income to be paid to the children, and upon the death of the last survivor of the decedent and her three children, the trust was to terminate and the corpus was

to be distributed to certain specified beneficiaries. (R. 13–14, 44.)

The trust instrument provided in part as follows (R. 44–45):

> EIGHTH. This trust may be terminated at any time either as to the whole or as to any part of the property held in trust hereunder, by the person or persons who shall then be trustees hereunder, such termination to be evidenced by a written declaration signed, sealed and acknowledged by them and duly recorded * * *, setting forth specifically the property as to which such termination is to take effect, and in that event the trusts declared hereunder shall as to such property be at an end and such property shall be paid over and conveyed, free and discharged of all trusts, to the said Adelaide J. Sargent, if she be then living, and if she be not then living one share shall be paid over and conveyed to each of her children who shall then be living, * * *.

The trust agreement also provided as follows (R. 16):

> In case of the absence from the United States of any trustee hereunder the other two trustees may exercise all the powers herein given to the trustees and perform all their duties, and the trustee so absent shall not be liable for the acts or omissions of his co-trustees during the period of such absence or for any losses arising therefrom, and the certificate of the other two trustees as to such absence, when signed, sealed and

acknowledged by him or them and duly recorded in the Registry of Deeds for Suffolk County, shall be conclusive.

The son of the decedent, who was one of the trustees and also a beneficiary, resided considerable time abroad, although at the time of the decedent's death and for some time prior to her death, he was in this country. (R. 45.) The trust also provided for the filling of vacancies by the remaining trustees if any of the trustees should resign or die. (R. 45.) In 1920 decedent resigned as trustee and her daughter, Mary Adelaide Poor, was appointed by the remaining trustees to fill the vacancy. Mary Adelaide Poor held office until November 9, 1921, when she resigned, and the decedent was duly appointed by the remaining trustees to fill the vacancy. The deceased continued as one of the trustees until the time of her death on January 22, 1931. The other trustees, the decedent's son, Arthur H. Sargent, and Harry LeBaron Sampson, served as trustees from the creation of the trust until the death of the decedent. (R. 45.)

The case was tried without a jury in the United States District Court for Massachusetts. The District Judge rendered judgment for the respondents for the amount of the decedent's estate taxes, which they had paid on account of including the corpus of the trust in the gross estate of the decedent. (R. 49.) The Circuit Court of Appeals for the First Circuit affirmed the judgment of the District Court.

SPECIFICATION OF ERRORS TO BE URGED

The United States Circuit Court of Appeals for the First Circuit erred:

1. In failing to determine that the value of the property in question, which was transferred in trust by the decedent, should be included in her gross estate, under the provisions of Section 302 (d) of the Revenue Act of 1926.

2. In refusing to find that the corpus of the trust, less the value of the interest, given to the son, who was also a trustee, should be included in the settlor's gross estate, under the provisions of Section 302 (d) of the Revenue Act of 1926.

3. In affirming the judgment of the District Court.

ARGUMENT

This case presents the questions of the construction and validity of Section 302 (d) of the Revenue Act of 1926, *supra,* which are also involved in *Helvering* v. *City Bank Farmers Trust Co.,* No. 10, October Term, 1935; and *Helvering* v. *Helmholz,* No. 14, October Term, 1935; and this case has been assigned for argument immediately following the argument of those cases. In the interest of brevity, the petitioner adopts and incorporates herein by reference the argument presented in the brief filed on behalf of the petitioner in *Helvering* v. *City Bank Farmers Trust Co., supra.*

We submit that the instant case clearly falls within the provisions of Section 302 (d), *supra,* because decedent by means of Article Eighth of

the trust instrument, *supra*, reserved to herself, in conjunction with two other persons, the power to terminate the trust at any time. The fact that the power to terminate the trust was reserved to the decedent in her capacity as a trustee, and not individually, furnishes no sound distinction, and the court below so held.

Respondent may argue that because in the instant case the conveyance in trust was made before the appearance in any taxing statute of any provision similar to Section 302 (d), *supra*, the application of Section 302 (d) to the transfer here involved is unconstitutional. We submit, however, that the constitutionality of the statute as applied to the instant transfer should be sustained on the ground that *by reason of the reservation of power the transfer was not fully completed until the death of the decedent*, which event occurred subsequent to the passage of the statute in question. *Reinecke* v. *Northern Trust Co.*, 278 U. S. 339; *Tyler* v. *United States*, 281 U. S. 497; *Phillips* v. *Dime Trust & S. D. Co.*, 284 U. S. 160; *Klein* v. *United States*, 283 U. S. 231; *Porter* v. *Commissioner*, 288 U. S. 436. As stated by the Supreme Court in *Tyler* v. *United States, supra* (pp. 502–503):

> A tax laid upon the happening of an event, as distinguished from its tangible fruits, is an indirect tax which Congress, in respect of some events not necessary now to be described more definitely, undoubtedly may impose. If the event is death and the result which is made the occasion of the tax is the

> bringing into being or the enlargement of property rights, and Congress chooses to treat the tax imposed upon that result as a death duty, even though, strictly, in the absence of an expression of the legislative will, it might not thus be denominated, there is nothing in the Constitution which stands in the way.
>
> The question here, then, is, not whether there has been, in the strict sense of that word, a "transfer" of the property by the death of the decedent, or a receipt of it by right of succession, but whether the death has brought into being or ripened for the survivor, property rights of such character as to make appropriate the imposition of a tax upon that result (which Congress may call a transfer tax, a death duty or anything else it sees fit), to be measured, in whole or in part, by the value of such rights.

And in the case of *Porter* v. *Commissioner, supra,* where the transfers were made before the enactment of any statutory provision like Section 302 (d), and where the taxing of those transfers was therefore open to the same constitutional attack of retroactivity as is the taxing of the transfer in this case, this Court nevertheless approved their inclusion in the gross estate of the decedent, saying (p. 444):

> His death terminated that control, ended the possibility of any change by him, * * *. That is the event on which Congress based the inclusion of property so transferred in the gross estate as a step in the calculation

to ascertain the amount of what in § 301 is called the net estate. Thus was reached what it reasonably might deem a substitute for testamentary disposition. *United States* v. *Wells*, 283 U. S. 102, 116. There is no doubt as to the power of Congress so to do.

Moreover, it is submitted that in the case at bar, for all practical purposes, the decedent retained substantial control over the disposition of the property in conjunction with the disinterested trustee, and that the control placed in her son in substance amounted to very little. This is apparent from the facts, in that the son, Arthur H. Sargent, was a resident of Paris, France, for the major portion of the period in question, and that, under Article 2 of the trust agreement, the other two trustees could exercise all the powers during his absence from the United States. The fact that he was not absent from the United States at the time of her death does not preclude the application of the statute, which is concerned with the *possibility* of the decedent's exercising control over the trust estate.

If this Court be of the opinion, however, that the interest of Arthur H. Sargent was an adverse interest and cannot constitutionally be included in the decedent's gross estate, then we submit that the interests of the decedent's other children in the trust estate should have been included in the decedent's gross estate, since as to those interests the interest of Arthur H. Sargent was not adverse, and

the doctrine of *Reinecke* v. *Northern Trust Co.*, 278 U. S. 339, does not apply. Accordingly, even if this Court should be of the opinion that the adverse interest of Arthur H. Sargent precludes the inclusion of his interest in the trust in the decedent's gross estate, the decision below should be reversed and the case remanded to determine the value of the interests of the decedent's children, other than Arthur H. Sargent, and to require the inclusion of the value of such interests in the decedent's gross estate. In *Lit* v. *Commissioner*, 72 F. (2d) 551, the Circuit Court of Appeals for the Third Circuit held that, while the value of the life estate of a wife in a trust created by her husband could not be included in the husband's gross estate because it was only in conjunction with the wife that the husband could amend or revoke the trust, the value of the remainder interest in the trust was nevertheless taxable.

CONCLUSION

We respectfully submit that the decision of the court below is erroneous and should be reversed.

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